

Before the

**BUREAU OF CUSTOMS AND BORDER PROTECTION  
DEPARTMENT OF HOMELAND SECURITY**

**Washington, DC 20229**

---

Changes to the Visa Waiver  
Program To Implement the  
Electronic System for Travel  
Authorization (ESTA) Program;  
Interim Final Rule and  
Solicitation of Comments

---

)  
)  
)  
)  
)  
)  
)  
)

USCBP-2008-0003

**COMMENTS OF THE  
IDENTITY PROJECT (IDP)  
AND JOHN GILMORE**

The Identity Project (IDP)

<<http://www.PapersPlease.org>>

A project of the First Amendment Project

1736 Franklin St., 9th Floor

Oakland, CA 94612

August 8, 2008

**SUMMARY**

The Identity Project submits these comments in response to the Interim Final Rule and Solicitation of Comments published at 73 *Federal Register* 32440-32453 (June 9, 2008), docket number USCBP-2008-2003, “Changes to the Visa Waiver Program To Implement the Electronic System for Travel Authorization (ESTA) Program”, and the associated “Regulatory Assessment” published on the Web site at <<http://www.regulations.gov>> and docketed as USCBP-2008-0003-0003.

The essence of the ESTA rule is to require certain foreign citizens to obtain an exit permit from the United States government before they may leave their own country, or leave other countries.

In this rulemaking, the Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security (DHS) is promulgating an interim final rule imposing a new requirement that “each nonimmigrant alien intending to travel by air or sea to the United States under the Visa Waiver Program (VWP) must ... prior to embarking on a carrier for travel to the United States”, (a) provide specified data elements, in specified form and manner, to the CBP, and (b) “receive a travel authorization, which is a positive determination of eligibility to travel to the United States under the VWP, via the Electronic System for Travel Authorization (ESTA), from CBP.”

Under the interim final rule, “[a]n authorization under ESTA is not a determination that the alien is admissible to the United States” and is “not a determination of visa eligibility.” It would be granted, or not granted, by the CBP, in its sole, standardless, secret, and non-reviewable “discretion.” It would be required as a pre-condition for foreign citizens to “embark” from foreign countries if the CBP believes that they intend to apply (at some later time ) for admission to the U.S. under the VWP.

The Identity Project submits these comments because this CBP regulatory requirement that foreign citizens obtain permission from the U.S. in order to leave their own country, or a third country, (1) exceeds the statutory authority of the CBP; (2) exceeds the jurisdiction of the CBP; (3) is contrary to the obligations of the U.S. under the International Covenant on Civil and Political Rights and other

international human rights, maritime, and aviation treaties; (4) has been promulgated without complying with the procedural requirements of Executive Order 13107 regarding Implementation of Human Rights Treaties, the Airline Deregulation Act, the Regulatory Flexibility Act, and the Administrative Procedure Act; (5) fails to consider or grossly underestimates many of the major costs of the rule, including its impact on small entities, business travelers, and other travelers; (6) is impermissibly vague, and (7) would be so impractical and unenforceable as to deprive it of any of the benefits claimed by the CBP,

The Identity Project urges the CBP to withdraw the interim final rule, in its entirety. If it does not withdraw the ESTA rule entirely, the CBP must complete the actions directed by Executive Order 13107, prepare the statutorily required analyses, publish them in a full Notice of Proposed Rulemaking (NPRM) , and provide a new opportunity for public comment, before finalizing any ESTA rule.

### **ABOUT THE IDENTITY PROJECT**

The Identity Project (IDP), <<http://www.PapersPlease.org>>, provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a nonprofit organization providing legal and educational resources dedicated to protecting and promoting First Amendment rights.

### **COMMENTS**

#### **I. THE ESTA RULE EXCEEDS THE CLAIMED STATUTORY AUTHORITY.**

The CBP claims that the ESTA rule is authorized by the 8 U.S.C. 1103 and 8 U.S.C. 1187. But the rule would impose additional requirements on travelers beyond what is specified by statute.

Under 8 U.S.C. 1187, as amended by Public Law 110-53 (August 3, 2007), the statutory obligation of travelers with respect to the ESTA is limited to an obligation that “before applying for admission to the United States “ they must “electronically provide .. information” (121 Stat. 341):

(11) ELIGIBILITY DETERMINATION UNDER THE ELECTRONIC TRAVEL AUTHORIZATION SYSTEM.—Beginning on the date on which the electronic travel authorization system developed under subsection (h)(3) is fully operational, each alien traveling under the program shall, before applying for admission to the United States, electronically provide to the system biographical information and such other information as the Secretary of Homeland Security shall determine necessary....

But under the interim final rule, 8 CFR 217.5 (73 *Federal Register* 32452-32453), “each nonimmigrant alien intending to travel by air or sea to the United States under the Visa Waiver Program (VWP) must” **both** “provide the data elements specified” and “receive a travel authorization”. Both of these requirements must be satisfied “prior to embarking on a carrier for travel to the United States.”

Any CBP authority over aliens under this statute is limited to the authority to require only that they provide certain information. The difference between the information disclosure requirement in the statute, and the permission and receipt of permission requirement in the interim final rule, is clearly substantive and material. The proposed requirement for aliens to receive a travel authorization clearly exceeds the claimed statutory authority, and must be withdrawn.

## II. THE ESTA RULE EXCEEDS THE JURISDICTION OF THE CBP.

By imposing a requirement that certain aliens receive authorization from the CBP before they may embark from foreign ports, the ESTA rule would assert U.S. jurisdiction over the actions of foreign nationals on foreign soil or on vessels (including foreign-flag vessels) in international waters or airspace. The CBP's statutory authority with respect to the ESTA begins at the time when an individual applies for admission to the U.S. under the VWP, at which point they are already at a U.S. point of entry, either on

U.S. soil or at a pre-clearance facility (such as those at airports in Canada) with defined and limited extraterritorial U.S. authority and jurisdiction.

By making the the ESTA requirement apply as of the point of “embarking on a carrier for travel to the U.S., the CBP would extend the territorial applicability of the ESTA rule to foreign locations, where neither CBP nor the U.S. government has jurisdiction over the actions of foreign citizens or any other non-U.S. persons. While the interim final rule contains no enforcement or sanctions provisions, any later attempt to add such sanctions to the ESTA rule (such as through enforcement orders to foreign travelers or foreign air or sea carriers, while they are outside the territorial jurisdiction of the U.S. ) would similarly exceed U.S. jurisdiction.

We note that this issue has been raised by airlines and others in pending rulemakings before other DHS component agencies, and has not yet been responded to. See the “Comments of the International Air Transport Association, Secure Flight Program, TSA-2007-28572” (November 21, 2007), available at <<http://www.regulations.gov>> under document ID number TSA-2007-28572-0334.1:

IATA and its Member Airlines are particularly concerned that the TSA’s Proposed Rule seemingly invokes legal rights to control actions taken on foreign soil by airlines and others that are not supported by the normal interpretation of international law, and the relations that exist between sovereign nations.... IATA questions the legal authority, under which TSA proposes to implement binding restrictions on entities operating outside of the US.... We urge TSA to consider the extraterritoriality issue with respect to limitations being imposed on reservation processes conducted outside of US territory, and to modify the proposal accordingly.

The CBP gives no basis for any claim of such U.S. and CBP extraterritorial jurisdiction over the non-U.S. places and non-U.S. persons to which the ESTA rule would apply, and we know of no basis for such a claim. The rule should be modified to limit its applicability to persons and entities within the territorial jurisdiction of the U.S. If the interim final rule is not modified, an NPRM must be published, stating a basis for the claimed extraterritorial jurisdiction over the actions of foreign nationals on foreign soil, and a new opportunity for comment on that jurisdictional claim must be provided before any ESTA rule is finalized.

**III. THE ESTA RULE IS CONTRARY TO THE OBLIGATIONS OF THE U.S. UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND OTHER INTERNATIONAL HUMAN RIGHTS, MARITIME, AND AVIATION TREATIES.**

The “travel authorization” required by the ESTA rule would not be an entry visa, determination of visa eligibility, or determination of admissibility to the U.S., but would be solely a determination of “eligibility to travel” which “grants the alien permission to travel”.

According to the interim final rule (*73 Federal Register 32453*):

An authorization under ESTA is a positive determination that an alien is eligible, and grants the alien permission, to travel to the United States under the VWP and to apply for admission under the VWP during the period of time the travel authorization is valid. An authorization under ESTA is not a determination that the alien is admissible to the United States. A determination of admissibility is made only after an applicant for admission is inspected by a CBP Officer at a U.S. port of entry.

As a travel permit or exit visa, required as a precondition to “embarking on a carrier for travel to the United States”, this “travel authorization” would be contrary to U.S. obligations under international human rights treaties protecting the right to leave any country, and international maritime and aviation treaties requiring that air and sea common carriers be required to operate as “common carriers”, obligated to transport all would-be passengers paying the fare and complying with the rules in their published tariff, and making no provision for denial of embarkation from any country on the basis of permission or lack thereof from any other country.

**A. The CBP is required to consider, and operate in accordance with, U.S. obligations under international human rights treaties including the International Covenant on Civil and Political Rights (ICCPR).**

Under Article VI, Section 2 of the U.S. Constitution, “treaties made, or which shall be, made, under the authority of the United States, shall be the supreme law of the land.”

The International Covenant on Civil and Political Rights (ICCPR) is a treaty which was ratified by the U.S. Senate on April 2, 1992 (138 *Congressional Record* S4782), and is binding on the U.S. As a treaty to which the U.S. is a party, the ICCPR takes precedence over Federal statutes.

The ICCPR was specifically effectuated with respect to Federal agency rulemakings by Executive Order 13107 regarding Implementation of Human Rights Treaties, 61 *Federal Register* 68991, also available at <<http://clinton6.nara.gov/1998/12/1998-12-10-executive-order-13107-on-human-rights-treaties.html>>, issued by the President on December 10, 1998. Executive Order 13107 provides in Section 1(a) that, “It shall be the policy and practice of the Government of the United States . . . fully to respect and implement its obligations under the international human rights treaties to which is a party, including the ICCPR”, and requires in Section 2(a) that, “All executive departments and agencies . . . shall maintain a current awareness of United States international human rights obligations that are relevant to their functions and shall perform such functions so as to respect and implement those obligations fully”. The obligations of U.S. government agencies including the CBP and DHS to act in accordance with the ICCPR are independent of the reservations expressed by the Senate, in ratifying the ICCPR, with respect to enforcement of the ICCPR by U.S. courts.

The ICCPR has also been effectuated by the Airline Deregulation Act of 1978, 49 U.S.C. 40101(c)(2), which requires that “the Administrator of the Federal Aviation Administration shall consider . . . (2) the public right of freedom of transit through the navigable airspace. “ That “right of freedom of transit” is defined by article 12 of the ICCPR, which sets the standards for freedom of travel and movement as protected human rights, and for the review of government actions which impinge on those rights. To the extent that, under the statutory terms of creation and transfer of both authority and responsibilities to the DHS and the CBP, the authority being exercised by the CBP in this rulemaking is inherited from that of the FAA under the Airline Deregulation Act, it is subject to this same requirement.

The CBP is required to consider in this rulemaking, and to conduct itself in accordance with, U.S. obligations under international human rights law, specifically including the ICCPR.

**B. The ESTA rule is inconsistent with U.S. obligations under the ICCPR.**

Article 12, paragraph 2 of the ICCPR provides that, “Everyone shall be free to leave any country, including his own.”

The meaning of this section is interpreted in paragraphs 8-10 of U.N. Human Rights Committee, General Comment No. 27 on Freedom of Movement in Article 12, issued under Article 40(4) of the ICCPR, CCPR/C/21/Rev.1/Add.9 General Comment No.27, 02/11/1999, available at

<<http://www.unhchr.ch/tbs/doc.nsf/0/6c76e1b8ee1710e380256824005a10a9?Opendocument>>:

8. Freedom to leave the territory of a State may not be made dependent on any specific purpose....
9. In order to enable the individual to enjoy the rights guaranteed by article 12, paragraph 2, obligations are imposed both on the State of residence and on the State of nationality. Since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents....

Both of these principles of Article 12 of the ICCPR would be violated by the ESTA rule. The rule would make the requirement for a “travel authorization” dependent on a specific purpose: it would apply only to those “intending to travel to the United States by air or sea under the VWP”, contrary to paragraph 8 of General Comment No. 27. And the rule would make a “travel authorization” a “necessary travel document”, but would not make it available as a matter of right -- only as a matter for the standardless, secret, administrative discretion, of the CBP -- contrary to paragraph 9 of General Comment No. 27.

The validity of any such rule is governed by Article 12, paragraph 3 of the ICCPR:

The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

Key to this standard of review is the concept of “necessity”. “Necessity” requires more than that a restriction on human rights be related to, or actually further, one of the enumerated purposes. “Necessity”



requires a showing by the government proposing the restriction that no less restrictive alternative could adequately serve the particular enumerated purpose.

This interpretation of “necessity” is supported by the U.N. Human Rights Committee, General Comment No. 27 on Freedom of Movement in Article 12, which provides in Paragraph 14:

Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.

The CBP has offered no such showing of “necessity”, and has made no attempt to evaluate the potential use of alternatives that would be less restrictive of the right to freedom of movement. We reserve the right to comment more fully if and when the CBP conducts, and publishes for public comment, in a full NPRM, this analysis of the necessity of the SSTA program required by the ICCPR. For now, however, we note that the analysis accompanying the interim final rule fails to show either that the proposed measures would be effective, or that no less intrusive alternatives would be equally effective.

Two major factors would negate the effectiveness and claimed benefits of the ESTA rule:

First, all travelers subject to the ESTA requirement to submit information and receive a “travel authorization” are (like many more other travelers not subject to the proposed ESTA rules) already subject to the “international APIS” final rule published August 23, 2007 at *72 Federal Register* 48320-48345, effective February 19, 2008. While the CBP describes the APIS rule as requiring airlines to transmit passenger information to CBP (*73 Federal Register* 42441, footnote 3), the international APIS rule also require each carrier to receive an individualized “clearance” permission message with respect to each passenger, before they issue them a boarding pass or permit them to board an air or sea vessel. See “Comments of the Identity Project, et al., Passenger Manifests for Commercial Aircraft Arriving in and Departing From the United States; Passenger and Crew Manifests for Commercial Vessels Departing From the United States, USCBP-2005-0003” (October 12, 2006), available at <<http://hasbrouck.org/IDP/IDP-APIS-comments.pdf>>.

The APIS information submission and “clearance” requirement is applicable to all travelers subject to the proposed ESTA information submission and “travel authorization” requirement, and to a far larger number of other travelers. In the “Regulatory Assessment” accompanying the interim final rules, the CBP concedes that they are unable to quantify any security benefit of the ESTA requirements over the current international APIS requirements (*73 Federal Register* 32451):

The APIS 30/AQQ analysis accounted for identifying a traveler of concern prior to the issuance of a boarding pass. Thus, we must not take credit for preventing a traveler from boarding an aircraft as a result of ESTA because that benefit has already been counted. We have not conducted a breakeven analysis for this rule because CBP has already accounted for preventing a traveler on a watchlist from boarding an aircraft and coming to the United States. This does not mean, however, that there are no security benefits of this rule—we simply have not quantitatively accounted for them here.

But in fact, the CBP neither identifies nor describes, even qualitatively, what any benefits of the ESTA rule over the existing APIS rule might be. We believe that there are none, and that in any case the burden is on the CBP to show what they are (in specific comparison with the current APIS “clearance” rule) and their sufficiency to satisfy the standards established Article 12, paragraph 3 of the ICCPR.

Second, the CBP fails to consider the possibility of using less intrusive measures which might achieve any legitimate desired result of the ESTA rule. In particular, the CBP has failed to consider, or to compare, the possibility of the use of existing legal and law enforcement procedures, such as requesting courts to issue injunctions or restraining orders restricting the travel of persons who can be shown to pose a risk sufficient to justify restrictions on their right to travel, or arrests and prosecutions, or requests for international law enforcement assistance in executing and enforcing such judicial orders.

As it stands, and absent the required justification of necessity, the interim final rule is flatly inconsistent with the U.S. obligations embodied in Article 12 of the ICCPR, and must be withdrawn.

**C. The ESTA rule is inconsistent with U.S. obligations under the Charter of the Organization of American States.**

Article 17 of the Charter of the Organization of American States (OAS), ratified by the U.S. June 15, 1951, available at <<http://www.oas.org/juridico/English/charter.html>>, provides that, “the State shall respect the rights of the individual”. The customary international law of human rights, which defines the rights of the individual protected by this Article, includes the Universal Declaration of Human Rights, adopted with the affirmative vote of the U.S. as United Nations General Assembly Resolution G217 A (III) of 10 December 1948, available at <<http://www.un.org/Overview/rights.html>>. Article 13 (2) of the Universal Declaration of Human Rights provides, without exception, that, “Everyone has the right to leave any country, including his own, and to return to his country.”

The requirement for a “travel authorization” as a condition of “embarking” or travel from any country, would violate Article 13 (2) of the Universal Declaration of Human Rights. Since this is among “the rights of the individual” protected by Article 17 of the Charter of the OAS, the ESTA rule is contrary to U.S. obligations under that Article of the Charter of the OAS.

**D. The ESTA rule is inconsistent with U.S. obligations under international maritime and aviation treaties related to the regulation and operation of air and sea “common carriers” .**

The U.S. is party to numerous international maritime and aviation treaties. While the terms of these bilateral and multilateral agreements vary, a common feature of almost all of these agreements is the requirement that the U.S. and the other states party to these agreements regulate airlines and certain ocean passenger shipping lines as “common carriers”. These treaties are effectuated in the U.S. by the Airline Deregulation Act of 1978, 49 U.S.C. 40102(a)(23), which requires that airlines operating international service to and from the U.S. be licensed only as “common carriers.”

By definition, a “common carrier” is required to transport all passengers complying with their published tariff of fares and conditions of carriage. *Tilson v. Ford Motor Co.*, 130 F. Supp. 676 (D. Mich., 1955). As licensed common carriers, airlines are thereby forbidden to refuse to transport an otherwise-qualified passenger, except on the basis of a binding order from a court of competent jurisdiction.

Any attempt to restrict the obligation of airlines to transport all passengers complying with their published tariffs, such as appears to be contemplated by the “travel authorization” requirement in the ESTA rule, is contrary not only to the Airline Deregulation Act but to the treaties which it effectuates.

#### **IV. THE CBP HAS FAILED TO COMPLY WITH APPLICABLE PROCEDURAL REQUIREMENTS AND TO CONDUCT REQUIRED ANALYSES OF THE ESTA RULE.**

In promulgating the ESTA rule, the CBP has failed to comply with the procedural requirements of, and to conduct the analyses required by, Executive Order 13107 regarding Implementation of Human Rights Treaties, the Administrative Procedure Act, the Regulatory Flexibility Act, the Airline Deregulation Act.

##### **A. The CBP has failed to carry out the actions mandated by Executive Order 13107, “Implementation of Human Rights Treaties”.**

Executive Order 13107, “Implementation of Human Rights Treaties”, 61 *Federal Register* 68991, also available at <<http://clinton6.nara.gov/1998/12/1998-12-10-executive-order-13107-on-human-rights-treaties.html>>, issued by the President on December 10, 1998, imposes the following obligations on all executive agencies (including CBP and DHS) and heads of agencies:

###### **Sec. 2. Responsibility of Executive Departments and Agencies.**

(a) All executive departments and agencies (as defined in 5 U.S.C. 101-105, including boards and commissions, and hereinafter referred to collectively as "agency" or "agencies") shall maintain a current awareness of United States international human rights obligations that are relevant to their functions and shall perform such functions so as to respect and implement those obligations fully.

As discussed earlier in these comments, and in our prior comments on CBP and other DHS rules to restrict the right to travel and movement, the CBP and DHS have failed to perform their rulemaking functions so as to respect and implement their obligations to respect to the rights to freedom of movement

guaranteed by the ICCPR and other international human rights treaties. This is a failure to comply with Section 2(a) of Executive Order 13107.

Executive Order 13107, Section 2(a) continues as follows:

The head of each agency shall designate a single contact officer who will be responsible for overall coordination of the implementation of this order...

We can find no public indication that either CBP or DHS as a whole has designated a “single contact officer” for implementation of human rights treaties or implementation of Executive Order 13107. This is a failure to comply with Section 2(a) of Executive Order 13107.

Executive Order 13107, Section 2, continues as follows:

(b) The heads of agencies shall have lead responsibility, in coordination with other appropriate agencies, for questions concerning implementation of human rights obligations that fall within their respective operating and program responsibilities and authorities or, to the extent that matters do not fall within the operating and program responsibilities and authorities of any agency, that most closely relate to their general areas of concern.

### Sec. 3. Human Rights Inquiries and Complaints.

Each agency shall take lead responsibility, in coordination with other appropriate agencies, for responding to inquiries, requests for information, and complaints about violations of human rights obligations that fall within its areas of responsibility or, if the matter does not fall within its areas of responsibility, referring it to the appropriate agency for response.

Neither CBP nor DHS has taken responsibility for responding to complaints about violations of human rights obligations that fall within their areas of responsibility. This is a failure to comply with Section 2(b) and Section 3 of Executive Order 13107.

For example, our specific complaint, filed with CBP, that the international APIS regulations promulgated by CBP violated U.S. obligations under Article 12 of the ICCPR has received no acknowledgment or response whatsoever. See “Comments of the Identity Project, et al., Passenger Manifests for Commercial Aircraft Arriving in and Departing From the United States; Passenger and Crew Manifests for Commercial Vessels Departing From the United States, USCBP-2005-0003” (October 12, 2006), available at <<http://hasbrouck.org/IDP/IDP-APIS-comments.pdf>>; see also the CBPs purported response to comments, failing to acknowledge or respond to our complaint of violation of the ICCPR,

“Advance Electronic Transmission of Passenger and Crew Member Manifests for Commercial Aircraft and Vessels; Final Rule, USCBP–2005–0003”, 72 *Federal Register* 48345, August 23, 2007.

We note that these comments and our unacknowledged and unanswered comments regarding the APIS rulemaking are complaints about violation of U.S. obligations under human rights treaties including the ICCPR. We specifically request that these comments and our previous APIS comments be referred to the CBP and DHS contact officers designated pursuant to Section 2(a) of Executive Order 13107, and that the heads of those agencies take responsibility for responding to these complaints, as they have been ordered to do under Section 3 of that order.

The CBP and DHS should perform the actions mandated by Executive Order 13107, including publicly designating a single contact officer for human rights treaty compliance and responding to these and any other related pending complaints of violations of U.S. obligations under human rights treaties, before any rules are finalized that are the subject of such complaints.

**B. The CBP has failed to consider the “public right of freedom of transit of the navigable airspace”, as required by the Airline Deregulation Act.**

As we have noted above, the Airline Deregulation Act of 1978, 49 U.S.C. 40101(c)(2), requires that “the Administrator of the Federal Aviation Administration shall consider ... (2) the public right of freedom of transit through the navigable airspace. “ That obligation has been inherited by the CBP and other DHS components, along with the transfer from the FAA to the DHS of authority over aviation security. Such an analysis should be a standard part of any aviation-related rulemaking by the CBP or DHS. But we can find no record that the CBP or any DHS component has ever conducted such an analysis, or complied with this statutory obligation, in any rulemaking.

The CBP has failed, in this rulemaking, to consider the public right of freedom of transit. The ESTA rules contain no recognition of a public right of freedom of transit. On the contrary, they condition travel on a “travel authorization” that would not be guaranteed or protected as a matter of right. Instead, it

would be granted, withheld, or revoked solely as a matter of secret, standardless, nonreviewable, administrative “discretion” by the CBP.

The CBP must, by law, consider this issue before any ESTA rule is finalized.

**C. The CBP has erroneously concluded that the ESTA rule would not have a significant impact on a substantial number of small economic entities, and has failed to conduct the analysis of that impact required by the Regulatory Flexibility Act.**

As noted by the CBP, “The Regulatory Flexibility Act (RFA) ... requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions) when the agency is required 'to publish a general notice of proposed rulemaking for any proposed rule.’” The CBP claims that this rulemaking is exempt from requirement for an NPRM under exceptions to the APA. As we discuss later in these comments, we believe these exceptions are not applicable, and that a full NPRM including an RFA analysis is required.

But according to the CBP, “Nonetheless, DHS has considered the impact of this rule on small entities and had determined that this rule will not have a significant economic impact on a substantial number of small entities. The individual aliens to whom this rule applies are not small entities as that term is defined in 5 U.S.C. 601(6). Accordingly, there is no change expected in any process as a result of this rule that would have a direct effect, either positive or negative, on a small entity.”

In fact, many of the individuals to whom the ESTA rule applies are, in fact, small economic entities within the meaning of the RFA. Nothing in the RFA excludes individuals from its definition of “small entities”. A large proportion of entries to the U.S. under the VWP are for business purposes. Of these, a large proportion are by sole proprietors, self-employed individuals, freelancers, and other individuals who meet the definition of “small entities” in the RFA.

The CBP has previously conceded, in response to our comments in other travel-related rulemakings, that individual travelers can be “small economic entities” within the meaning of the RFA. See most recently, “Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports-of- Entry From Within the Western Hemisphere”, *73 Federal Register* 18403 (April 3, 2008):

*Comment:* One commenter noted several examples of individuals who would be considered small businesses, including sole proprietors, self employed individuals, and freelancers.

*Response:* CBP agrees that these “sole proprietors” would be considered small businesses and could be directly affected by the rule if their occupation requires travel.... The number of such sole proprietors is not available from the Small Business Administration or other available business databases, but we acknowledge that the number could be considered “substantial.”

The continued insertion in new rulemakings (such as the current one) by the CBP of a knowingly false boilerplate claim that “individuals are not small entities” raises serious doubt as to the competence, diligence, and good faith with which the rulemaking is being conducted. The CBP should retract this false claim in this rulemaking, and remove it from its templates for future rulemakings.

The ESTA rule would affect a substantial number of these individuals. The CBP assumes (*73 Federal Register* 32448) that “1 percent of ESTA applicants from current VWP travelers will subsequently need to apply for a visa”, i.e. will not receive a “travel authorization through the ESTA. We know of know reason to expect this figure to be lower for sole proprietors traveling for business, and this would clearly constitute a “substantial” number of such affected “small entity” business travelers.

The only remaining question is whether the ESTA rules would have a “significant economic impact” on individual travelers in their capacity as small economic entities. We believe it would.

The impact of the ESTA rule would not be limited to the cost of obtaining a visa. In many cases, business travel is required on short notice, and business travelers are those most likely to change their intended destinations while en route, to take advantage of business opportunities or respond to events. A would-be business traveler who does not receive a “travel authorization”, or whose travel authorization is revoked (as it could be, under the interim final rule, at any time without warning), may not have time to



obtain a visa. The consequences are likely to be substantial opportunity losses, including in some cases permanent loss of customers (who might deem someone unable to travel unreliable for the future).

The impact is likely to be greatest on the smallest businesses. A large business is more likely to have local staff available in country, or to have alternate staff available if any particular individual does not receive a “travel authorization”. Almost by definition, a sole proprietor, self-employed person, or freelancer has no one else to send in their place, if they are personally unable to travel.

As a first estimate, we believe that typical economic consequences to a sole proprietor, self-employed person, or freelancer of failure to receive a “travel authorization”, or its revocation, would be measured in thousands of dollars per person. But the mean would be skewed sharply upward by those who would lose clients or accounts worth tens or hundreds of thousands of dollars a year in business. Accordingly, we believe that \$10,000 would be a reasonable initial minimum estimate of the mean per person impact of the rule. This would clearly be “significant” for such a sole proprietorship.

Accordingly, the CBP must conduct the analysis of the impact of the ESTA rule on small economic entities (including individual travelers and would-be travelers, and including the costs of being unable to travel if a visa cannot be obtained in time), as required by the RFA, and publish that analysis for public comment before any rule is finalized.

**D. The exceptions to the notice and comment requirements of the Administrative Procedure Act claimed by the CBP are not applicable to this rulemaking.**

The CBP claims (73 *Federal Register* 32444) that this rulemaking is statutorily exempt from the notice and comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. 553. On that basis, the CBP proposes that the interim final rule be effective on short notice, before the end of the comment period, and without a full NPRM. However, none of the three statutory exceptions claimed by the CBP is applicable to the ESTA rule.

First, the CBP claims that, “This interim final rule addresses requirements that are procedural in nature and does not alter the substantive rights of aliens from VWP countries seeking admission to the United States. This interim final rule, therefore, is exempt from notice and comment requirements under 5 U.S.C. 553(b)(A). This rule is procedural because it merely automates an existing reporting requirement for nonimmigrant aliens, as captured in the 'I-94W Nonimmigrant Alien Arrival/Departure Form'.”

The error in this analysis is that the change in information submission requirements from a paper form to the ESTA is only part of the interim final rule. The rule also contains a new requirement for receipt of a “travel authorization”, an item entirely absent from the I-94W form or current CBP rules. Imposition of a new travel permission requirement cannot be characterized as a merely “procedural” change, and clearly impacts substantive rights. Submission of an I-94W form occurs only after arrival at a U.S. port of entry, and has no effect on the ability to embark or travel to the U.S., arrive on U.S. soil (which can be crucial to the other substantive and procedural rights of an alien), present oneself for admission to the U.S., or make other legal claims that can only be made once one reaches U.S. territory.

Second, the CBP claims that “This interim final rule is also exempt from APA rulemaking requirements under the “good cause” exception set forth at 5 U.S.C. 553(b)(3)(B).” The CBP then attempts to justify the application of this exception by the need to keep potential terrorists off aircraft, through a comparison of the ESTA rule with existing I-94W and visa application procedures.

The error in this analysis is that the comparison should be with the international APIS system, not the I-94W procedures. In its analysis of the interim final rule, the CBP concedes that airline passengers are already subject to the APIS information and “clearance” (CBP permission to travel) rules, and that the CBP is unable to quantify any security benefit to the ESTA rule when it is compared with the existing APIS rules. Since the CBP cannot quantify any benefit of the ESTA rule, and cannot even qualitatively describe such a benefit, the “good cause” exception to the APA does not apply.

Third, the CBP claims that, “This interim final rule is also excluded from the rulemaking provisions of 5 U.S.C. 553 as a foreign affairs function of the United States because it advances the

President's foreign policy goals, involves bilateral agreements that the United States has entered into with participating VWP countries, and directly involves relationships between the United States and its alien visitors.”

The error in this analysis is that the “foreign affairs function” exception to the APA applies to relationships with foreign governments – not, as here, to a rule that affects only individual aliens. Nor does the exception apply to anything that is declared, conclusorily, to “advance ... foreign policy goals”. The only potentially applicable grounds for this claim is that it “involves bilateral agreements” to which the U.S. is a party. But a binding international “agreement” can be entered into by the U.S. only through a treaty duly ratified by the Senate. The CBP does not mention, and we are not aware of, any treaties involved here – except for the ICCPR and other treaties which the ESTA rule itself would violate. Since the ESTA rule would not implement any treaty, but rather is forbidden by treaty, it is not related to carrying out any lawful foreign policy function, and is not exempt from the APA.

Accordingly, the CBP must comply with the notice and comment requirements of the APA, and postpone the effective date of any final rule until after the publication of a full NPRM, an opportunity for public comment on that full NPRM, and CBP's consideration and published response to comments.

## **V. THE CBP HAS FAILED TO CONSIDER MANY OF THE COSTS OF THE ESTA RULE.**

Included with the interim final rule is an analysis by the CBP of the costs of implementing and complying with the ESTA rule, with further details in an accompanying “Regulatory Assessment.” That analysis ignores or underestimates many of the major costs and consequences of the ESTA rule for both airlines and travelers, resulting in a gross underestimate of the total costs of the rule.

With respect to airlines, the CBP estimates (*73 Federal Register* 32445) that “35 foreign-based air carriers will be affected” by the ESTA rule. But the CBP admits in the Regulatory Assessment (pp. 2-6, 2-7) that this is likely to be an underestimate:

For air carriers, we consulted the IATA website for member details (air carrier name and country). We then accessed individual carrier websites to determine if the carriers flew to or from the United States and if the carrier country is VWP, Roadmap, or the United States. Based on our analysis of carrier websites, we determined that 8 US-based carriers and 35 foreign-based carriers will likely have to develop ESTA capabilities. Our methodology may understate the number of affected airlines. For example, an Algerian carrier is not included in this analysis because Algeria is neither a VWP nor a Roadmap country. The Algerian carrier, however, may transport passengers to the United States who are citizens of a VWP or Roadmap country. There are no data publicly available from IATA, individual carriers, or CBP on passenger citizenship. We make the simplifying assumption that only carriers from VWP and Roadmap countries that fly to the United States and all international US carriers will have to develop ESTA capabilities. [emphasis added]

In fact, as anyone who has flown on such airlines knows, many airlines that are not based in countries that participate in the VWP, and that are not in the “Roadmap” for VWP expansion, regularly carry large numbers of passengers to the U.S. who are citizens of VWP countries. Some of these airlines even operate direct flights from VWP countries to the U.S. For example, India is neither in the VWP nor the Roadmap. But Air India operates a daily flight from Heathrow Airport in London to Kennedy Airport in New York, on which a large percentage of the passengers are UK and other European Union citizens who, on arrival at JFK, apply for admission to the U.S. under the VWP.

In fact, citizens of VWP countries arrive in the U.S. on virtually every airline that serves the U.S. from anywhere in the world. The “simplifying” assumption that they do so only on airlines based in VWP countries is not simplifying but simply wrong. We estimate that between 100 and 200 foreign airlines would be affected significantly by the ESTA rule, so that the costs to air carriers would be about five times those estimated by the CBP for only 35 foreign airlines. Even more airlines, including ones that don't serve the U.S. at all, might be affected, depending on how the ambiguous term “embarking” in the ESTA rules is defined with respect to through journeys with interline connections.

With respect to travelers who do not receive a “travel authorization” (or whose travel authorization is revoked), as we have already pointed out, the interim final rule and Regulatory Assessment erroneously limit their consideration to the costs of obtaining a visa. This ignores the likely, and much greater, costs of canceling a trip if a visa cannot be obtained in time, or delaying a trip until a visa can be obtained.

Earlier in these comments, we estimated the mean cost to each would-be business traveler who does not receive a “travel authorization” (or whose travel authorization is revoked), as \$10,000.

For leisure travelers, costs would be less but still substantial. These would include the opportunity cost of lost or wasted vacation time (since a vacation scheduled in advance with an employer frequently cannot be rescheduled on short notice) as well as forfeited payments for non-refundable or non-changeable tickets, accommodations, tour packages, cruises, etc. A large and rapidly growing percentage of international airfares – particularly including the sorts of heavily discounted airfares most used by vacation travelers – are now completely nonchangeable and nonrefundable “use it or lose it” fares. The same is true of many discounted, prepaid hotel reservations. Most tour packages are 100% nonrefundable and nonchangeable once the date is within a week of the scheduled departure. Any many visitors come to the U.S. under the VWP to board cruises from the U.S., such as those to the Caribbean. If they are delayed in reaching the U.S. because they don't receive a “travel authorization”, and have to get a visa, they may miss the cruise sailing entirely (and forfeit the price of the cruise), or incur large costs to fly to an intermediate port to join the cruise.

We estimate that three-fourths of those leisure travelers who do not receive a “travel authorization” might be able to obtain a visa in time to proceed to the U.S. on their originally intended schedule, and that the other one-fourth will incur change or cancellation fees, forfeited prepayments, and opportunity costs of lost vacation time averaging a total of \$2000 per person. That means leisure travelers would have average costs of \$500 for non-receipt or revocation of a “travel authorization”.

If half the travelers who do not receive a “travel authorization” are business travelers (average cost \$10,000 per person) and half are leisure travelers (average cost \$500), the overall average cost would exceed \$5,000 per person. The Regulatory Assessment estimates that there will be approximately 20 million VWP visitors per year, 1% of whom will not receive a “travel authorization” through the ESTA. That means 200,000 would-be travelers a year who do not receive a “travel authorization” or have it revoked, at an average cost of more than \$5,000 each, for a total underestimate by the CBP of slightly

more than \$1 billion a year in ESTA costs to travelers and would-be travelers. This large amount of money – indeed, this entire cost category -- was not taken into account when the CBP calculated the cost of the ESTA rule.

## VI. THE INTERIM FINAL RULE IS IMPERMISSIBLY VAGUE.

Foreign citizens subject to the ESTA rule must provide information and receive a travel authorization “prior to embarking on a carrier for the United States.” But the interim final rule does not define either “embarking on a carrier” or “for the United States”. Each of these phrases is vague.

Under the ESTA rule, travelers will be able to submit information and receive travel authorizations over the Internet. This will make it possible for them to do so at every stage of the series of events, any of which might be deemed to constitute “embarking ... for the United States”. Wireless data networks currently allow mobile Internet access from laptop computers as well as mobile phones and other handheld devices throughout airports, before and after check-in and during the boarding process, in departure lounges, on jetways, on aircraft both before and after the doors are closed, and increasingly in flight both over national territory and in international airspace. Similar networks are accessible to passengers on oceangoing vessels, at dockside, on the gangway, and on ships both in port and at sea.

In the absence of any definition, it is impossible to know whether, or if so, when, an individual would be considered to have engaged in an act of “embarking” (or to have done so “for the United States”) or to be in compliance with the ESTA rule. It is impossible for an individual to know whether, and if so, by what point in time, they are required to have submitted their information and received their travel authorization. And it would often be impossible, after the fact, to determine whether they provided their information or received their travel authorization before or after “embarking ... for the United States”, or without ever having engaged in such an act of “embarking ... for the United States.

Without definition, the word “embarking” is ambiguous. To embark can mean either to “board” a vessel or to “start” or “commence” a voyage. Either of these different meanings is a *process* that takes some time (during which an individual might be busy on their cell phone submitting information and attempting to obtain a travel authorization), not an event that occurs at a single point in time.

Is an individual considered to embark at the moment when they enter an airport? When they present themselves for check-in? When they receive a boarding pass (which might be revoked, for example in the case of a passenger who is “bumped” or offloaded)? When they clear outbound immigration (if any)? When they clear outbound customs (if any)? When they present themselves at the gate for boarding? When (if) their boarding pass is collected? When they step onto the jetway or stairs? When they step off the jetway or stairs through the door and into the aircraft? When the doors are closed? When the pilot receives clearance to taxi or for push-back from the gate? When the aircraft actually begins to move away from the gate? When the pilot receives clearance for takeoff? When the takeoff roll begins? At “wheels up”? When the aircraft leaves the airspace of the departure country?

When is an embarkation considered to be “for the United States”? What if the vessel is scheduled to make other stops, after the passenger boards, before reaching the U.S.? What if a passenger on a multi-stop flight or cruise changes their point of disembarkation, after they are on board? What if the destination is unknown, or unknown to the individual traveler? Cruise ship contracts of carriage invariably give the vessel operator the right to alter the itinerary and/or ports of call at any time, before or after commencement of the cruise, without notice. Airlines can and do change schedules and intermediate stopovers, sometimes without notice to those not booked for stopovers at the altered intermediate points (but whose tickets may nonetheless permit such stopovers). Aircraft are frequently diverted for technical, operational, weather, and safety reasons. An attempt to give notice may or may not be made, at any stage of the process, and travelers may or may not receive actual notice of such changes. It is common for a traveler, especially on a diverted flight or re-routed cruise, to find that their ship has docked, or their plane has landed, at an unexpected port or airport in an unexpected country, in the U.S. or elsewhere.

In such cases of changes of, or uncertainty in, the itinerary, is a traveler considered to have engaged in an act of “embarking for the United States” at all, and if so, at what point in time is that act of embarking considered to have been consummated? Consider the passenger on a cruise ship who had not planned to go ashore in Fort Lauderdale, but decides to do so while in port. Perhaps he learns of a family emergency in another country, and leaves the ship to get a flight home. Or perhaps he is just inspired by onboard advertising to join a shore excursion to Disney World. At what point in time, if any, is he considered to have engaged in an act of “embarking on a carrier for travel to the United States”?

Because of these ambiguities, an individual cannot tell whether, or if so, when they would be required to have submitted information or received a travel authorization, and the interim final rule is void for vagueness. An NPRM containing sufficiently unambiguous definitions must be published, and a new opportunity for comment on that NPRM provided, before any ESTA rule can be finalized.

## **VII. THE ESTA RULE WOULD BE SO IMPRACTICAL AND UNENFORCEABLE AS TO DEPRIVE IT OF ANY OF THE BENEFITS CLAIMED BY THE CBP.**

The interim final rule specifies no penalties, sanctions, or enforcement mechanisms. Addition of any such sanctions, penalties, or enforcement orders – such as orders to common carriers purporting to direct them to prevent “embarking for the United States” by persons believed to be subject to, but believed not to be in compliance with, the ESTA rule -- would fundamentally change the nature of the rule, and would require a new NPRM and a new opportunity for public comment on the proposed penalties, sanctions, or enforcement orders before they could be finalized. Any such sanctions, penalties, or orders would, on their face, restrict rights protected by Article 12, paragraph 2 of the ICCPR (“Everyone shall be free to leave any country, including his own”), and the NPRM for any such sanctions, penalties, or orders would have to show that they satisfy the standards applicable under Article 12, paragraph 3 of the ICCPR to regulations that restrict that right. We reserve our right to comment further on any such proposal when it is made.



Even if such measures were to be proposed, however, the ESTA rule would be impractical and unenforceable, depriving it of any of the benefits claimed by the CBP.

Whether a person is required to obtain an ETA depends on their “intending to travel to the United States by air or sea under the VWP”, as of the moment of their “embarking on a carrier to the United States.” Only those with that specific intent, at that specific time, would be required to have submitted the required information or received the required “travel authorization.”

Any enforcement or compliance mechanism would thus depend on the ability to ascertain the intentions of travelers, as of the moment of their “embarking”, with respect to subsequent travel to and application for entry to the U.S. under the VWP. Those who, at that time, lack that intent, are not subject to any requirement of these ESTA rule – regardless of whether they subsequently, on arrival at a U.S. port of entry, form such an intent and/or actually apply for admission to the U.S. under the VWP.

Regardless of how “embarking .. to the United States” is defined, most visitors to the U.S., including most visitors who eventually apply for admission to the U.S. under the VWP, do not have such a specific intent at the time of their “embarking.” Many arrive in the U.S., and actually apply for admission under the VWP, without ever forming such a specific intent.

Those who lack such specific intent (as of the time of their embarking), and therefore who are not subject to the ESTA rule, include the following:

1. Travelers who do not intend to travel “to” the US, but intend to travel merely “through” the U.S. in transit, en route to another country. The U.S. no longer makes any provision for such transit without visa (TWOV) and without formal entry “to” the U.S.. But it’s the international norm, and every country currently participating in the VWP allows transit without visa by U.S. citizens. So a great many foreigners, quite reasonably if mistakenly, expect the U.S. to reciprocate, and present themselves at points of embarkation for the U.S. without intending to travel “to”, or to “enter”, the U.S. Some already have onward tickets from the U.S. to other countries before embarking,

but some intend to buy tickets for the onward portion of their journey while in transit through the U.S. So these travelers are indistinguishable by any of their documents, at the time of embarking, from travelers intending to enter the U.S.

2. Travelers who intend to seek to enter the U.S. under any program or category other than the VWP. As long as their belief is sincere, it doesn't matter whether any such program actually exists, much less whether they would be admissible under it. Someone, for example, who knows that they are unlikely to be admitted as a refugee, but who says sincerely, "I intend to apply as a refugee, and take my chances", is not subject to the proposed ESTA requirement, as is someone whose intent is to apply for a visa on arrival (regardless, as long as their intention is sincere, of the fact that the U.S. doesn't issue visas on arrival).
3. Travelers who lack any specific intention with respect to the particular program or category, if any, under which they will attempt, once they arrive, to be admitted to the U.S. U.S. citizens can be admitted to almost any of countries participating in the VWP without prior arrangement and without requesting admission under any particular program. Many citizens of such countries reasonably expect reciprocal treatment when they visit the U.S., and embark on trips to the U.S. without giving any particular thought to whether they will be admitted (they assume that they will), much less under which particular provision of U.S. law. Someone who intends to tell the immigration officer on arrival, "I'm a tourist" or "I'm here on business", and let the officer figure out how to categorize them under U.S. law, lacks the intent with respect to the VWP that would subject them to the ESTA requirement. Even someone generally aware of the procedures for entry to the U.S. without a visa, but unaware at the time of their embarking that they comprise something called the "Visa Waiver Program" (something most visitors learn, if at all, only from in-flight literature and videos, and are unlikely to remember by name from one trip to the next), lacks the specific intent that would make them subject to the ESTA requirements.

4. Travelers who form an intention to apply for admission to the U.S. under the VWP only after embarking, perhaps after reading or viewing in-flight information materials.
5. Travelers who believe that the VWP is an entry program, not a travel program, and who therefore do not possess the requisite intent to “travel to the United States under the VWP”. If they have any specific intention with respect to their travel to the U.S., it is that they intend to travel to the U.S. under the terms of their contract of carriage with a common carrier, the regulations governing the operation and obligations of common carriers, and/or their rights under the ICCPR and/or customary international law. Their intentions, if any, with respect to the VWP, are limited to intentions with respect to actions on arrival at a U.S. port of entry.

We believe that most visitors who apply for admission under the VWP fall into one or another of the classes we have just listed, and that only a minority of VWP travelers possess such specific intent, as of the time of their embarking, as would make them subject to the ESTA requirements.

A determination by the CBP with respect to a person who applies for a travel authorization through the ESTA would be exempt from judicial review. But whether someone who did not apply for an ESTA is subject to the ESTA requirements -- and thus could be subjected to any such sanctions, enforcement measures, or orders as might be proposed in a later rulemaking -- is and would remain subject to judicial review.

The issue is whether a person has, at the moment of embarking, an actual intent to travel to the U.S. under the VWP, and whether there is sufficient evidence to establish such an intent. And all that matters is the genuineness of their intentions, not whether those intentions might be unreasonable, ill-founded, mistaken, or incapable of realization (for example, if they sincerely intend to enter the U.S. on some other nonexistent or inapplicable basis, rather than under the VWP). And of course, many travelers' intentions (if any) change in the course of their travels, *especially* during the process of “embarking”, making the determination of specific intent *at a specific time* crucial to the rule.

Enforcement of the ESTA rule would thus depend on the ability of the CBP to (1) identify the minority of travelers with such intent, at the point of embarking, as to make them subject to the proposed ESTA requirements, and (2) obtain sufficient evidence to make a *prima facie* showing of such intent.

The CBP lacks any staff at most foreign ports. And even in places where they are present (for example, at “preclearance” stations in Canada for U.S.-bound travelers) their authority is limited (both by U.S. law and by the agreements with Canada and other countries under which the preclearance facilities operate) to questioning relevant to admissibility to the U.S.. Since a travel authorization is not a determination of admissibility to the U.S., questions about ESTA status are irrelevant to admissibility to the U.S. and outside the scope of authority of CBP preclearance officers. Travelers thus may lawfully decline to answer such questions from preclearance officers, without penalty.

As we have already noted, airlines have already questioned DHS jurisdiction over their actions on foreign soil. And as we have also noted, U.S. laws (such as the Airline Deregulation Act), and a plethora of international maritime and aviation treaties, classify airlines and ocean transportation lines as “common carriers” and require them to transport anyone paying the fare in their published tariff and complying with their general conditions of carriage, as filed with the governments between which they operate and as applied equally to all would-be passengers. Nothing in existing law or treaties, or typical conditions of carriage, grants airlines the investigatory authority of law enforcement officers, authorizes them to compel passengers to respond to interrogatories as to what they intend to do after they arrive at their destination, or authorizes them to refuse passage to those who decline to specify any particular intention or do not have a “travel authorization”. Such authority could not be granted by U.S. statute, but would require signing and ratification of amendments to numerous treaties.

Neither the ESTA rule nor any statute obligates travelers to declare, either to the U.S. government or anyone else, their intentions (if any) for whether, or on what basis, they intend to seek entry to the U.S., until they actually arrive at a U.S. port of entry and present themselves for admission.

So even if the CBP assigned officers to all foreign ports from which visitors might embark to the U.S., the ESTA rule could be enforced only against those who volunteered, at the point of embarking, that they possess the specific intent to “travel to the United States ... under the VWP.”

Would-be terrorists or any other minimally skilled and knowledgeable malefactors, of course, would either keep mum about their intentions, disclaim any particular intention, claim to intend merely to transit the U.S. without entry, or profess some plausible intention, other than entry under the VWP, the sincerity of which would be difficult or impossible for anyone at the point of embarking to disprove. As a result, they would not be subject to the proposed information submission and “travel authorization” requirements. So whatever else it would do, the ESTA rule will have absolutely no effect on any but the most inept terrorists or criminals, and will not achieve any meaningful security benefits.

### **CONCLUSION**

The ESTA interim final rule exceeds the statutory authority and jurisdiction of the CBP; is contrary to the obligations of the U.S. under the International Covenant on Civil and Political Rights and other treaties; has been promulgated by the CBP without complying with the procedural requirements of Executive Order 13107 regarding Implementation of Human Rights Treaties, the Airline Deregulation Act, the Regulatory Flexibility Act, and the Administrative Procedure Act; fails to consider or grossly underestimates many of the major costs of the rule; is impermissibly vague; and would be so impractical and unenforceable as to deprive it of any of the benefits claimed by the CBP.

The Identity Project urges the CBP to withdraw the interim final rule, in its entirety. If it does not withdraw the ESTA rule entirely, the CBP must complete the actions directed by Executive Order 13107, prepare the statutorily required analyses, publish them in a full Notice of Proposed Rulemaking (NPRM), and provide a new opportunity for public comment, before finalizing any ESTA rule.

Respectfully submitted,

The Identity Project (IDP)

[<http://www.PapersPlease.org>](http://www.PapersPlease.org)

A project of the First Amendment Project

1736 Franklin St., 9th Floor

Oakland, CA 94612

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

Edward Hasbrouck,

Consultant to IDP on travel-related issues

James P. Harrison

Staff Attorney, First Amendment Project

Director, IDP

John Gilmore

Post Office Box 170608

San Francisco, CA 94117